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Transaction Being Analyzed: California SH 125
(Incorporates Lessons Learned from the SR 91 Project)

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KEY ELEMENTS OF PUBLIC PRIVATE PARTNERSHIP ("PPP") AGREEMENTS

Last Updated: September 2005

No.	Key Element/Legal Issue:	Response/Suggested Model Provision:
1.	Type of PPP agreement: <ul style="list-style-type: none"> a. Design-Build-Operate-Maintain b. Pre-Development Agreement c. Concession - Investor Financed d. Concession - Tax-exempt Financed e. Other 	Concession - Investor Financed.
2.	Agreement resulted from: <ul style="list-style-type: none"> a. Unsolicited proposal and negotiations b. Competitive procurement following unsolicited proposal c. Competitive procurement d. Sole-source negotiations e. Other 	Request for projects, followed by negotiation.
3.	What is the title and date of the primary PPP agreement? Who are the parties to that agreement? What is the form of the private entity (e. g., corporation, LLP, LLC, partnership or joint venture)? If a joint venture, is there joint and several liability? Are the obligations of the private entity guaranteed by one or more third parties (other than sureties)?	<p>Development Franchise Agreement for a Privatized Transportation Project, made and entered into as of December 31, 1990, by and between San Diego Expressway Limited Partnership [Note: assigned from California Transportation Ventures, Inc. to San Diego Expressway Limited Partnership], and The State of California, Department of Transportation, Acting by and through the Director of Transportation.</p> <p>San Diego Limited Partnership is a limited partnership.</p> <p>No third party guarantees provided.</p>

4.	Does the PPP agreement contemplate a subsequent assignment of the private entity's rights to another entity, such as a non-profit corporation to be formed for the purpose of financing the project?	<p>21.3. ASSIGNMENT.</p> <p>(a) Except as described in Article XX [Leasehold Mortgages], this Agreement and the other Franchise Documents and the rights of Developer (the private entity) thereunder may not be assigned by Developer without the written consent of Caltrans, except, when found by Caltrans to be qualified to operate the Facility:</p> <p style="text-align: center;">* * * *</p> <p>(2) to a joint powers agency, community facilities district, or similar public entity which has entered into contractual arrangements with Developer or its designee to lease or operate the Project. Any such permitted assignee shall succeed to all rights and obligations of Developer under this Agreement and the other Franchise Documents.</p>
5.	Describe conditions applicable to the financing plan (types, sources, and covenants of capital financing).	<p>12.4. FINANCIAL OBLIGATIONS.</p> <p>(a) Subject to the cooperation of Caltrans pursuant to Section 11.4, Developer shall be responsible for</p> <p style="padding-left: 40px;">(i) obtaining all financing required in connection with the development, construction and operation of the Project, and</p> <p style="padding-left: 40px;">(ii) arranging for servicing and retirement of all such debt incurred by Developer. Without limiting the means for fulfillment of the foregoing obligations, Developer may obtain financing through a local governmental</p>

		entity.
6.	What other major ancillary agreements are there? Are other agreements contemplated to be executed in the future (e.g., such agreements might include a design-build contract, a concession agreement, a full or partial completion guaranty and/or financing agreements)?	Lease Agreement Maintenance Service Agreement Airspace Lease Agreement
7.	What are the roles of the public and private entities for pre-financing tasks, such as project definition, preparation of environmental documents, permitting, traffic and revenue studies, surveys, geotechnical investigations, right-of-way acquisition and preliminary engineering, public involvement?	Developer has full responsibility for pre-financing tasks, without reimbursement by Caltrans. Caltrans has responsibility for obtaining certain environmental approvals.
8.	How is the private entity to be compensated for pre-financing costs (e.g., current reimbursement, reimbursement from financing proceeds, development fee, return-on-equity contribution)?	Return on equity.
9.	How is the private entity to be compensated for its equity and debt contributions with respect to design, acquisition, permitting, construction, and related services? How is the private entity to be compensated for operation and maintenance services?	The Developer (the private entity) has the right to impose and collect tolls, subject to limitations on its overall rate of return.
10.	Is the public entity required to exercise its power of eminent domain to facilitate the transportation facility?	Yes. (a) After Project approval as set forth in Section 6.4, Caltrans will utilize its power of condemnation with respect to specific parcels designated for inclusion in the Project right-of-way, provided that (i) Developer has requested such assistance; (ii) Developer has complied with the requirements of Exhibit E, and (iii) Developer has made a written offer of just compensation at appraised fair market value and the property owner has refused such offer, or has failed to respond to

		<p>such offer within sixty days. Caltrans shall use its best efforts to effectuate the condemnation process, including without limitation obtaining necessary approval by the California Transportation Commission.</p> <p>(b) Caltrans condemnation actions shall be limited to parcels, including Uneconomic Remnants, required for the Project right-of-way. Uneconomic Remnants so acquired shall be disposed of by Caltrans in accordance with California Law.</p> <p>(c) All property condemned by Caltrans shall be held with Title or Operational Control in the name of Caltrans, subject to the Lease for the full term of the Lease. Right of entry to all property condemned by Caltrans, sufficient to allow Developer to construct a particular Transportation Facility and to enable Developer to exercise its Airspace rights hereunder shall be issued by Caltrans to Developer prior to commencement of construction of such Transportation Facility in the form of a standard encroachment permit.</p>
11.	Does the public entity establish the design, construction, operation and maintenance standards with which the private entity must comply?	Yes.
12.	Describe any payment due from the private entity to the public entity for the grant of rights.	<p>Developer shall pay Caltrans a monthly franchise fee of \$10 as required by Streets and Highways Code section 30801, payable annually in advance in installments of \$120.00.</p> <p>Revenues in excess of maximum return payable as excess franchise fee.</p>

13.	What is the mechanism by which user fees, if any, are established and adjusted? Describe any limitations or user fees and exempt vehicles.	Developer shall have the right, in its sole discretion, to establish, and thereafter to modify from time to time, the toll rates applicable to: (1) various classes of vehicles, (2) vehicle occupancy levels, (3) times of use and (4) portion of Project utilized. Caltrans shall have no right to regulate or participate in the setting of toll rates.
14.	Describe any revenue recovery between the public and private entities.	<p>10.3. APPLICATION OF CASH FLOW.</p> <p>Within 60 days after delivery to Caltrans of the notice required by Section 10.2, Developer shall apply any positive Cash Flow disclosed in such notice, in the following order of priority:</p> <p>(a) first, if the Base Return Account is then negative, Developer shall retain all such positive Cash Flow, or such lesser amount as is necessary to cause the Base Return Account to be equal to zero.</p> <p>(b) second, to the payment, pro rata, of any Incentive Entitlement then payable to Developer and any Incentive Franchise Fee then payable to Caltrans.</p> <p>(c) third, if the amounts in the Developer's Incentive Suspense Account and in the Caltrans Incentive Suspense Account are not each equal to zero, then pro rata to Developer and Caltrans until the amount in each such Suspense Account is equal to zero.</p> <p>(d) fourth, any remaining positive Cash Flow shall be paid to Caltrans as Excess Franchise Fees.</p>
15.	What is the duration of the agreement and what are the options to extend this timeframe (if applicable)?	<p>Term of Lease (which commences after completion of construction) is 35 years, subject to the following in Section 9.1:</p> <p>(b) If Developer has demonstrated to Caltrans satisfaction that it is or will be unable to achieve a Base Return Account of zero (0) or greater over the term of the Lease, Caltrans will use its best efforts (including formal participation, as appropriate, in any and all legislative, judicial and administrative proceedings) at Caltrans expense to obtain legislation permitting extension of the Lease for an additional term sufficient to permit the recovery of a reasonable return on</p>

		investment in the manner contemplated by this Agreement.
16.	What are the major performance milestones that will be required of the parties, including the public entity and the private entity?	<p>Section 6.4 ****</p> <p>(b) Upon completion of the environmental review process, as evidenced by the filing of a Notice of Determination by Caltrans accepting either the original or an amended Exhibit A, Project description, Developer may proceed with Construction Commencement of the Project pursuant to the terms of this Agreement and shall diligently pursue such construction to completion. Construction shall in any event be commenced by the date which is ninety (90) days from the NTP Date (as defined in Section 3.7(d) hereof) subject to extension for events of Force Majeure.</p> <p>[Section 3.7 contains complex provisions relating to extensions to NTP. The original language in Section 3.7(d) read: "Developer shall achieve Substantial Completion of the SR 125 Tollway from San Miguel Road to Otay Mesa by six months after the later of December 31, 2001 or four years after the Record of Decision, but, in any event, within one year after the opening of the Connector."]</p>
17.	Describe measures of compensation upon termination for convenience.	<p>No direct right. However Developer has the right to seek compensation for "losses" in certain events and Caltrans agrees and understands that Developer is entitled to seek compensation for losses resulting from the occurrence of any of the following operative events:</p> <p>(a) The State legislature, the California Transportation Commission, or any other administrative agency or authority of the State enacts, adopts, promulgates, modifies, repeals, or changes any State law, rule, initiative, referendum, constitutional provision, or regulation, all or any of which has the effect of</p> <ul style="list-style-type: none"> (i) directing Caltrans to acquire the Transportation Facility or portion thereof, (ii) terminating, limiting, reducing, or abrogating the rights or benefits of Developer under this Agreement, or (iii) regulating or interfering with Developer's right to establish and collect tolls; <p>(b) The voters of the State, by initiative, referendum, or other ballot measure, enact, adopt, promulgate, modify, repeal, or change any State law, rule, initiative, referendum, constitutional provision, or regulation, all or any of which has the effect of (i) directing Caltrans to acquire the Transportation Facility or portion thereof, (ii) terminating, limiting, reducing,</p>

		<p>or abrogating the rights or benefits of Developer under this Agreement, or (iii) regulating or interfering with Developer's right to establish and collect tolls; or</p> <p>(c) Any court issues any order, decree, or judgment which has the effect of</p> <p>(i) directing Caltrans to acquire the Transportation Facility or portion thereof,</p> <p>(ii) terminating, limiting, reducing, or abrogating, the rights or benefits of Developer under this Agreement,</p> <p>(iii) declaring illegal, void, or ultra vires any portion of this Agreement or voiding the rights of Developer under this Agreement, or</p> <p>(iv) regulating or interfering with Developer's right to establish and collect tolls.</p> <p>Caltrans shall, immediately upon determination of the award to which Developer is entitled, use its Best Efforts to obtain from the State Legislature an appropriation and/or other authorization to enable it to pay to Developer the amount of such award as expeditiously as possible, and payment shall be subject to the terms of such authorization.</p>
18.	Describe any performance standards, performance warranties, or performance guarantees.	Design and construction must be in accordance with Caltrans standards.
19.	If applicable, describe the private entity's rights and obligations to provide future project capacity improvements, extras, or expansions.	<p>See 3.2 and Article VI.</p> <p>In Section 6.2, Developer may develop and construct the Project as a sequence of Transportation Facilities or stages thereof, as contemplated by Exhibit A hereto. Subject to Section 3.7 hereof, the completion of any Transportation Facility or stage thereof shall not obligate Developer to complete any or all subsequent Transportation Facilities or stages.</p> <p>Sec. 3.2 (e) Caltrans' obligations under Section 3.2 (d) 2, 3, 5, and 6, above shall terminate as to a specific Transportation Facility upon one hundred twenty (120) days notice if both of the following events have occurred:</p> <p>1. Either:</p> <p>(a) All Transportation Facilities for which the Transfer Date has occurred have operated at the level of traffic corresponding to Caltrans' "E" level of service designation for at least two</p>

		<p>consecutive hours per day on at least 150 days per year over a two-year period; or</p> <p>(b) All debt incurred in connection with the development, construction, financing or refinancing of the Project has been repaid from Project revenues or SANDAG reimbursements, and</p> <p>2. Developer is not diligently pursuing the development and construction of additional capacity expansion of the Project. Evidence of such non-pursuit shall exist when more than two years have passed since the occurrence described in 1.(a) and the steps required by Article VI with respect to such capacity expansion have not been completed.</p>
20.	Who is responsible for the operation and maintenance of the completed facility?	<p>12.6. MAINTENANCE OBLIGATIONS.</p> <p>(a) Developer shall arrange for all maintenance activities at toll collection points and within the Project right-of-way. Developer will perform roadway, bridge, sign, lighting, landscape, fencing and other maintenance services either with its own forces, by contract with entities reasonably acceptable to Caltrans, by contract with Caltrans, or by any combination of these methods.</p>
21.	Describe any provisions relative to competitive transportation facilities (include a description of what constitute competitive facilities, exceptions, and measure of damages).	<p>9. Franchise Zone</p> <p>a. In relation to Transportation Facility I (and II, if undertaken): The Franchise Zone is a 6 mile wide south-north corridor having SR-125 as its center axis and bordered on the south by the Mexican border and on the north by SR-54.</p>
22.	Is the private entity required to reimburse the public entity for services? For design review? Permitting? Operation and maintenance? Policing?	Yes.

23.	If applicable, what is the reasonable/ maximum return or rate of return on investment authorized for the developer/ operator to earn, the formula by which such rate of return will be calculated and the distribution of project revenues?	<p>10.1. DETERMINATION OF REASONABLE RETURN ON INVESTMENT.</p> <p>In consideration of Developer's obligations and undertakings hereunder, Caltrans hereby agrees and stipulates that the Cash Flow to be retained by Developer pursuant to Section 10.3 of this Agreement will not be deemed to exceed a "reasonable return on investment" contemplated by the Act.</p> <p>Rights of Developer to Cash Flow is determined by a highly complex. See Article X</p>
24.	What events constitute developer/ operator defaults, and what are the major remedies available to the public owner?	Default on a material obligation under the agreement and event of bankruptcy. If default remains uncured, Caltrans has right to terminate franchise.
25.	What other rights does the public entity have to terminate the agreement (e.g., failure to meet milestones, termination for convenience)? If the agreement is terminated for convenience, what compensation is paid to the private entity?	See above.
26.	What events constitute public entity defaults, and what are the remedies available to the developer/operator?	<p>17.4. CALTRANS' DEFAULT.</p> <p>The occurrence of any of the following events shall constitute an Event of Default by Caltrans:</p> <p>(a) Caltrans shall wrongfully give notice of termination of this Agreement or any Lease;</p> <p>(b) Any representation or warranty made by Caltrans herein shall have been false in any material respect on the date made;</p> <p>(c) Caltrans shall fail to observe or perform any material covenant, agreement, term, or condition required to be observed or performed by Caltrans hereunder including, but without limitation, those set forth in Section 3.2, Article VI, Article XV and Article XX;</p> <p>(d) Caltrans shall breach or default in the performance of any material obligation under any other Franchise Document; or</p> <p>(e) An "operative event" as described in Section 17.8 shall have occurred.</p> <p>"Operative Event" includes legislative or administrative action, referendum of court action that adversely impacts Developer's</p>

		rights.
27.	What are the lender's rights and remedies with respect to private entity defaults? Does the agreement provide for lender's rights and remedies?	Extensive provisions for right to cure and exercise rights under any Financing Agreement.
28.	What indemnification obligations do each of the parties have?	Developer indemnifies Caltrans against design and construction errors or defects. Separate provisions of obligations of each of the parties for Hazardous Materials.
29.	<p>What are the obligations of the developer/operator to maintain records, to allow inspection and audit and to provide regular reports to the public owner?</p> <p>What obligation does the public entity have to maintain the confidentiality of specified information?</p>	<p>21.4. RECORDS.</p> <p>Developer shall maintain all records, documents, and other data for a period not less than five years from the date that material was generated. Records, data, and documents will be kept in such a manner as to provide a clear distinction between direct and indirect costs related to either the Project and the costs of other projects and operations undertaken by Developer. Said records will be made available by Developer for Caltrans inspection, audit, or copying to substantiate Costs in the event of any question arising with regard to work or recovery from toll revenues.</p> <p>12.9. REPORTING REQUIREMENTS.</p> <p>(a) A final audit of the Capital Base and Capital Costs with respect to each Transportation Facility or stage thereof, performed at Developer's expense, by a recognized Certified Public Accountant approved by Caltrans, shall be delivered to Caltrans within six months after the corresponding Transfer Date. Audit examinations will be made in accordance with generally accepted auditing practices and standards adopted by the American Institute of Certified Public Accountants.</p> <p>(b) One hundred twenty (120) days after the end of each fiscal year, beginning with the year in which the first Transfer Date occurs, Developer shall provide Caltrans with annual financial reports pursuant to 10.2 audited by a recognized independent accounting firm selected by Developer and approved by Caltrans. Annual reports shall include the independent auditor's</p>

		<p>report, a balance sheet, and a statement of income and expenses (including a traffic and toll revenues report, a report of Operating Costs, a list of transactions and contracts with Related Parties, and the reports required by Exhibit G).</p> <p>(c) Caltrans reserves the right to conduct or have conducted, at its own expense, within three years after submission of each report required by this Section 12.9, an audit similar to the audits outlined in (a) or (b) above and to determine that the calculations prescribed by Article X have been made by Developer accurately and in accordance with the terms of this Agreement. Items determined by Caltrans as a result of such audit to be materially at variance with normal commercial practices (including contractual relationships between Developer and Related Parties) and not resolved by negotiation shall be resolved in accordance with Article XIX of this Agreement. The amounts of such variances, if any, which are agreed by the parties or determined pursuant to Article XIX shall be taken into account and appropriate adjustments (including, where applicable, exclusions of expenditures from Outflows) shall thereafter be made in the calculations required by Article X.</p>
30.	<p>What are the conditions under which the private entity may assign its rights under the PPP agreement and/or its rights to the transportation facility?</p> <p>Can it assign its rights to a non-profit or other entity for purposes of financing?</p> <p>Can it make an assignment for security?</p> <p>Can it transfer its rights and obligations to an affiliate or unrelated third party? What are the conditions, if any, to obtain the consent of the government entity?</p>	<p>21.3. ASSIGNMENT.</p> <p>(a) Except as described in Article XX [leasehold mortgages], this Agreement and the other Franchise Documents and the rights of Developer thereunder may not be assigned by Developer without the written consent of Caltrans, except, when found by Caltrans to be qualified to operate the Facility:</p> <p>(1) to one or more entities under common control with Developer, to Developer's</p>

corporate parents or subsidiaries, to a partnership of which Developer or any Affiliated Entity is a general partner, or to a corporation including as shareholders Developer or any of its Affiliated Entities, or (2) to a joint powers agency, community facilities district, or similar public entity which has entered into contractual arrangements with Developer or its designee to lease or operate the Project. Any such permitted assignee shall succeed to all rights and obligations of Developer under this Agreement and the other Franchise Documents.

(b) This Agreement shall be binding upon and enforceable by and against the respective successors and assigns of Developer and Caltrans.

(c) Developer may assign monies due or to become due it under the Agreement, and any such assignment will be recognized by Caltrans, upon receipt of notice thereof, to the extent permitted by the Laws and Regulations. Any assignment of money shall be subject to all proper setoffs in favor of Caltrans.

20.1. FINANCING ASSIGNMENTS.

		<p>From time to time during the term of this Agreement, Developer shall have the right, at its sole cost and expense, to mortgage, pledge, sublease, hypothecate, deed in trust, assign revenues of the Project and/or collaterally assign its interest in this Agreement and/or any other Franchise Document as security for any debt, such debt to be issued on such terms and conditions as may be acceptable to Lender and Developer (the mortgage, pledge, sublease, hypothecation, deed of trust, assignment, or other security instrument being referred to in this Agreement as a "Financing Assignment"), subject to the following conditions:</p> <p>*****</p>
31.	Describe lender protection provisions (if any).	<p>20.2. RIGHTS AND OBLIGATIONS OF LENDERS.</p> <p>So long as any Financing Assignment shall remain unsatisfied and Caltrans has received the notices specified in paragraph (c) of Section 20.1 above, and in addition to the cure rights of Developer and Lender set forth in Article XVII, the following provisions shall apply:</p> <p>(a) Caltrans agrees that should any event or condition occur under any Franchise Document which would either immediately or with the passage of the applicable grace period or the giving of notice or both, enable Caltrans to terminate or suspend its obligations under any Franchise Document (a "Termination Event"), Caltrans shall not terminate such Franchise Document until it first gives written notice of such Termination Event to each Lender, and provides each Lender a reasonable opportunity to cure such Termination Event, as provided below:</p>

32.	What dispute resolution mechanisms are provided for?	Arbitration if: (i) the disputed amount does not exceed \$500,000, (ii) it does not relate to Section 3.2 [franchise rights and non-compete provisions], and (iii) when aggregated, all unresolved disputes to date do not exceed \$5,000,000.
33.	Describe any provisions regarding high-occupancy toll lanes or variable pricing.	Developer shall have the right, in its sole discretion, to establish, and thereafter to modify from time to time, the toll rates applicable to: (1) various classes of vehicles, (2) vehicle occupancy levels, (3) times of use and (4) portion of Project utilized. Caltrans shall have no right to regulate or participate in the setting of toll rates.
34.	Describe any provisions or HOV policy (if applicable).	See above.
35.	Describe any provisions limiting liability or waiving consequential damages.	None.
36.	Describe any public subsidy of revenues (e.g. shadow tolls, assumption of operation and maintenance costs).	None.

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